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No. 85-885

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD FRANK ZELEZNIK, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort claims were barred by the two-year statute of limitations applicable to the Federal Tort Claims Act, 28 U.S.C. 2401(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is reported at 770 F.2d 20. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1985, and a petition for rehearing was denied on August 26, 1985 (Pet. App. la-2a). The petition for a writ of certiorari was filed on November 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of the court of appeals' holding that their claims against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*,

were barred by the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b), where petitioners knew both the fact of their injury and its cause in 1974, but did not learn of the identity of the federal government as a potential defendant until 1982.

1. The relevant facts are undisputed. Petitioners are the parents of Arnold Frank Zeleznik, a nine year old boy who was murdered by Vernal Walford on December 20, 1974. Following their son's murder, petitioners investigated Walford's background and learned that he had recently been released from the Northampton State Hospital, a Massachusetts state psychiatric facility, where he had been involuntarily committed. Petitioners brought suit against both the hospital and its personnel in Massachusetts state court, but their suit was dismissed in 1975 on the ground of sovereign immunity. Pet. App. 5a, 13a.

In September 1982, petitioners learned that three weeks prior to the murder, Walford had presented himself at an office of the United States Immigration and Naturalization Service (INS) in Springfield, Massachusetts. Pet. App. 5a, 15a.[1] At that time, Walford allegedly identified himself as an illegal alien, recently released from the state hospital, and reported both his fraudulent possession of an illegal passport and his involvement in an illegal drug transaction. *Ibid.*; *id.* at 13a-15a.[2] Although INS's Springfield office initiated an inquiry into Walford through the Boston, Massachusetts, and Hartford, Connecticut, INS offices, the INS did not detain Walford. *Ibid.*; C.A. App. 44a.

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[1]Petitioners learned this information as a result of an investigation into the practices of the state psychiatric facilities by the Massachusetts legislature. Pet. App. 5a, 15a.

[2]The facts that petitioners allege Walford revealed to the INS officials are contained in their complaint. Pet. App. 14a-15a, quoting Complaint ¶ 11 (C.A. App. 113a-114a).

On September 19, 1983, petitioners filed administrative claims with the INS under the FTCA, both individually, for the wrongful death of their son, and, in the case of petitioner Carter Zeleznik, as administrator of his estate. Petitioners alleged that the INS was negligent in failing to detain Walford and in failing to investigate his past more thoroughly. These claims were denied by the INS by letter dated March 1, 1984. Pet. App. 5a, 15a.

2. Petitioners then commenced this action in the United States District Court for the Eastern District of Pennsylvania, alleging that the INS was negligent in failing to detain, investigate, and deport Walford. The district court granted the government's motion for summary judgment on the basis of the two year statute of limitations contained in 28 U.S.C. 2401(b) (Pet. App. 13a-22a).[3] Identifying the central issue as "when [petitioners'] claim accrued" for the purpose of the two-year limitations period (*id.* at 17a), and relying on *United States* v. *Kubrick*, 444 U.S. 111 (1979), the district court concluded that a claim accrues "[o]nce the injury and its cause are known" (Pet. App. 18a) and that petitioners' FTCA claim accrued in 1974 when both the injury (their son's murder) and its cause (Vernal Walford) were apparent and "put [petitioners] on notice of an invasion of their legal rights" (*id.* at 19a; see *id.* at 18a-20a).[4]

3. The court of appeals affirmed (Pet. App. 3a-12a). The court of appeals agreed with the district court that "the general rule is that the cause of action accrues at the time of

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[3]28 U.S.C. 2401(b), provides, in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *.

[4]The district court also noted that there was no "suggestion * * * that the government acted fraudulently to conceal its contact with Walford." Pet. App. 20a.

the last event necessary to complete the tort," which usually occurs at the time of the injury. *Id.* at 7a. The court noted that there were only three narrow exceptions to that rule—where an injured party is unaware that he in fact has been injured; where the fact of injury alone is insufficient to put an injured party on notice as to its cause; and where the government wrongfully conceals its tortious conduct—none of which was applicable to this case. *Id.* at 7a-9a. As the court explained, the events that occurred in 1974 gave petitioners sufficient notice of the invasion of their legal rights and therefore the burden was on them "to determine within the limitations period whether any party may be liable to [them]" (*id.* at 10a). The contrary rule, the court found, would "make every accrual date indefinite as to unknown possible parties" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

Under the Federal Tort Claims Act (FTCA), a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. 2401(b). The general rule is that a tort claim accrues at the time of a plaintiff's injury. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979); *id.* at 125 (Stevens, J., dissenting); *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984); *Richman* v. *United States*, 709 F.2d 122, 123 (1st Cir. 1983); Restatement (Second) of Torts § 899, at 441-442 (1979). Moreover, in the absence of any misconduct by the government concealing its involvement in the actions giving rise to a plaintiff's claim of injury, a claim "accrues" for purposes of the FTCA at the time that the plaintiff is injured

even though he may be unaware of the federal government's potential involvement. See *Gibson* v. *United States*, No. 83-6118 (9th Cir. Jan. 30, 1986), slip op. 18-19; *Dyniewicz*, 742 F.2d at 487; *Richman*, 709 F.2d at 123-124; *Davis* v. *United States*, 642 F.2d 328, 331-332 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Steele* v. *United States*, 599 F.2d 823, 828 (7th Cir. 1979); see also *Wollman* v. *Gross*, 637 F.2d 544, 547-548 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981); *Snorgrass* v. *United States*, 567 F. Supp. 33, 34-35 (E.D.N.Y. 1983); *Flickinger* v. *United States*, 523 F. Supp. 1372, 1375-1376 (W.D. Pa. 1981); *Lien* v. *Beehner*, 453 F. Supp. 604, 605-606 (N.D.N.Y. 1978).

Under that rule, petitioners' claims were properly dismissed by the district court. Petitioners' injury (the death of their son) occurred in 1974, but petitioners did not file their tort claim with the INS until 1982, well past the limitations period. Additionally, petitioners have not alleged that the government fraudulently concealed the INS's contact with Walford. Pet. App. 19a-20a; C.A. App. 112a-119a (complaint). The lower courts thus correctly held that petitioners' tort claims were untimely.

Petitioners erroneously assert (Pet. 7-11) that the court of appeals' decision conflicts with this Court's ruling in *Kubrick*. In that case, the Court recognized a limited exception to the general accrual principle for medical malpractice claims. In such cases, under what has come to be known as the "discovery rule," the two-year limitations period does not begin to run until a plaintiff discovers (or should have discovered) both his injury and its cause. See 444 U.S. at 120.[5] However, the limited exception recognized in *Kubrick*

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[5] *Kubrick* involved a medical malpractice claim against the Veterans Administration (VA) for negligent treatment of a patient's leg injury with an antibiotic that resulted in his deafness. 444 U.S. at 113-114. It was undisputed in that case that the plaintiff was aware of both his

does not extend beyond the medical malpractice context to ordinary torts like the one at issue here. See, *e.g.*, *Gibson*, slip op. 18-19; *Dyniewicz*, 742 F.2d at 486-487; *Richman*, 709 F.2d at 123; *Steele*, 599 F.2d at 828.

First, the reasons underlying this exception to the general accrual rule—the difficulty in learning within a two-year period following medical treatment whether a plaintiff's "injury" is the consequence of disease or malpractice, as well as a plaintiff's need to rely on his physician, who is the potential tort feasor, for advice as to the nature of his "injury" (see *Kubrick*, 444 U.S. at 120-121 n.7)—are inapplicable in the case of an ordinary tort. The discovery rule was designed simply to put a plaintiff claiming injury from medical malpractice on the same footing as a person claiming injury from an ordinary tort. See *Dyniewicz*, 742 F.2d at 486-487; *Davis*, 642 F.2d at 331; *Steele*, 599 F.2d at 826-827 & n.7. Accordingly, the rule, by its terms, does not extend the period within which a plaintiff claiming injury from an ordinary tort may bring suit.[6] Second, applying the

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injury (his deafness) and its probable cause (the antibiotic) more than two years prior to filing his administrative claim under the FTCA. 444 U.S. at 118. On that record, this Court held that the plaintiff's claim was barred by the statute of limitations, rejecting the court of appeals contrary ruling that his claim did not accrue until he knew or should have known of the " 'possibility that the treatment was improper.' " *Id.* at 116-117 (citation omitted). As the Court recognized, such a standard would "undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government" (*id.* at 123 (footnote omitted)), and "would go far to eliminate the statute of limitations as a defense separate from the denial of a breach of duty" (*id.* at 125).

[6]See *Richman*, 709 F.2d at 123: "Counsel's ingenuity doubtless deserves recognition, but it is misplaced. The delayed accrual of a patient's claim against his physician for malpractice is an exception to the general rule that, in the absence of fraudulent concealment, minority, or other special excuse, a statute of limitations begins to run from the date of the wrongful act."

discovery rule where both the fact and cause of an injury are known, but the government's potential involvement is not, would indefinitely extend the limitations period beyond the two-year term fixed by Congress. See *Richman*, 709 F.2d at 124 ("[t]here would be no limit to when the government might be sued if a plaintiff could assert ignorance as an excuse for not pursuing her claim within the statutory period"). In fact, it was for precisely that reason that *Kubrick* rejected the argument that the limitations period should be tolled until a plaintiff learns that his legal rights have been violated. See 444 U.S. at 122-125. As both the district court and the court of appeals recognized (Pet. App. 10a-11a, 20a), the rule that petitioners espouse would lead to precisely the sort of indefinite extension of the accrual date rejected in *Kubrick*.[7]

Nor does the court of appeals' ruling conflict with *Barrett* v. *United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983). In *Barrett*, the court recognized that a tort claim generally accrues at the time of a plaintiff's injury (689 F.2d at 327), but found that the government had intentionally concealed material facts regarding its responsibility in administering hallucinogens to an unwitting mental patient as part of a military experiment (*id.* at 328-330). In ruling that the plaintiff's claim was timely, the court merely applied the equitable doctrine that

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[7]Petitioners maintain (Pet. 7-11) that the general accrual rule should be modified for their case because they exercised "due diligence" in attempting to discover the INS's contact with Walford. This is an overstatement of the opinions below. The portion of the district court opinion cited by petitioners (Pet. App. 21a) stating that petitioners "ha[d] done all that anyone could expect them to do" was not a finding of fact, but was merely that court's observation that application of a statute of limitations occasionally leads to a harsh result. In any event, a finding of due diligence is irrelevant in the absence of wrongful conduct on the part of the defendant to hide his negligent conduct from the plaintiff. *Dyniewicz*, 742 F.2d at 486-487; *Davis*, 642 F.2d at 331.

a defendant's fraudulent concealment of material facts relating to his wrongdoing tolls the statute of limitations until the plaintiff discovers, or by reasonable diligence should have discovered, the basis of his claim. 689 F.2d at 327-330; see *Richman*, 709 F.2d at 123; *Snorgrass*, 567 F. Supp. at 35.[8] By contrast, in this case petitioners have not alleged that the government fraudulently concealed the INS's contact with Walford. *Barrett* is therefore clearly distinguishable. See *Diminnie* v. *United States*, 728 F.2d 301, 305-306 (6th Cir. 1984), cert. denied, No. 83-6799 (Oct. 1, 1984) (plaintiff must show fraudulent concealment before accrual will be postponed); *Davis*, 642 F.2d at 332. Moreover, the court of appeals recognized that this equitable doctrine is an exception to the general accrual principle under the FTCA. Pet. App. 9a; page 4, *supra*. The court simply found that it did not apply to this case. Petitioners' fact-bound argument to the contrary does not merit further review.

Petitioners also erroneously contend (Pet. 15-17) that the court of appeals' decision conflicts with *Ware* v. *United States*, 626 F.2d 1278 (5th Cir. 1980). The plaintiff in *Ware*, a dairy farmer whose herd of cattle was destroyed by the government based upon a diagnosis of tuberculosis, first learned two years later that the diagnosis was erroneous and that his cattle were in fact healthy. 626 F.2d at 1280-1281. The court held that the plaintiff's claim was not barred by 28 U.S.C. 2401(b), on the ground that "[he] did not know he had suffered damage" since "the government misled [him] into believing that the cattle were killed out of necessity"

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[8]This doctrine provided the basis for decision in several of the cases cited by petitioners. *Bergman* v. *United States*, 551 F. Supp. 407, 421-422 (W.D. Mich. 1982); *Liuzzo* v. *United States*, 485 F. Supp. 1274, 1282-1285 (E.D. Mich. 1980); see *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir. 1984), cert. denied, No. 83-6799 (Oct. 1, 1984) (explaining the basis for the rulings in *Bergman* and *Liuzzo*).

(626 F.2d at 1284). By contrast, petitioners knew in 1974 that they had suffered a compensable legal injury.[9] The government's failure sua sponte to disclose Walford's contact with the INS cannot be treated as fraudulent concealment and clearly did not mislead petitioners (see *Davis*, 642 F.2d at 332).[10] Finally, the court of appeals' ruling does not ignore the "humane purpose[s]" of the FTCA.[11] Pet. 13. Rather, it recognizes, as did this Court in *Kubrick*, that statutes of limitations serve important public policies that must also be given effect. See 444 U.S. at 117-118, 125.[12]

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[9]Petitioners' awareness of their claim is evidenced by their investigation of Walford following their son's murder and their suit against the Commonwealth of Massachusetts. Pet. App. 5a.

[10]The reverse of the "cause" but no "damage" situation in *Ware* is the "damage" but no "cause" situation in *Stoleson* v. *United States*, 629 F.2d 1265 (7th Cir. 1980), also cited by petitioners (Pet. 8). In *Stoleson*, the plaintiff was aware of her physical impairments (heart problems) but not its cause (exposure to nitroglycerin) "since medical science did not then recognize the causal connection [between the two]." 629 F.2d at 1270. The court of appeals held that plaintiff's claim accrued when "Dr. Lange of the Medical College of Wisconsin documented for the first time the relationship between occupational exposure to nitroglycerin and cardiovascular problems." *Ibid.*; see also *McGowan* v. *University of Scranton*, 759 F.2d 287 (3d Cir. 1985) (plaintiffs' decedent died from toxic shock syndrome when cause unknown to medical science). By contrast, petitioners knew the cause of their son's death in 1974.

[11]Petitioners reliance (Pet. 13) on the legislative history of the FTCA limitations statute is equally unavailing. The Court noted in *Kubrick* that, to the extent that the legislative history is helpful, it suggests that Congress extended the limitations period from one to two years to accommodate plaintiffs' interests but nonetheless believed that the time of injury would be the time of accrual. *Kubrick*, 444 U.S. at 119 n.6, citing H.R. Rep. 276, 81st Cong., 1st Sess. 3-4 (1949). Petitioners' analogy (Pet. 13-14) to the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, is also flawed. Unlike the FELA, the FTCA is a limited waiver of sovereign immunity and must be strictly construed in accordance with its terms. *Kubrick*, 444 U.S. at 117-118.

[12]In any event, the decision by INS not to arrest and deport Walford would fit within the "discretionary function" exception to the FTCA, 28

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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U.S.C. 2680(a). Cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); see generally *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984).

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